

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

FRANCESCO PORTELOS,	*	Case No. 12-CV-3141 (RRM)
	*	
Plaintiff,	*	Brooklyn, New York
	*	October 16, 2014
v.	*	
	*	
CITY OF NEW YORK, et al.,	*	
	*	
Defendants.	*	
	*	
* * * * *		

TRANSCRIPT OF CIVIL CAUSE FOR TELEPHONE CONFERENCE  
BEFORE THE HONORABLE VERA M. SCANLON  
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiff:	BRYAN D. GLASS, ESQ. Glass Krakower LLP 100 Church Street, 8th floor New York, NY 10007
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For the Defendants:	JESSICA GIAMBRONE, ESQ. HEIDI GRYGIEL, ESQ. DANIEL LIM, ESQ. New York City Law Department 100 Church Street New York, NY 10007
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1 (Proceedings commenced at 11:35 a.m.)

2 THE COURT: All right. This is Judge Scanlon.

3 We're on this call for Portelos vs. City of New York, et al.,  
4 12-CV-3141. For the plaintiff.

5 MR. GLASS: Bryan Glass.

6 THE COURT: And for the defendants.

7 MS. GIAMBRONE: For defendants, Assistant  
8 Corporation Counsel, Jessica Giambrone, and I'm here with two  
9 attorneys from our litigation unit, Heidi Grygiel and  
10 (inaudible).

11 THE COURT: You're breaking up. Heidi, what's her  
12 last name?

13 MS. GIAMBRONE: G-R-Y --

14 THE COURT: Hang on. Somebody is either breathing  
15 heavily, or moving, or in the wind or something. There's some  
16 heavy noise on this, so whoever it is, please stop or move to  
17 a place where that's not going to happen. Okay.

18 Heidi and G-R-Y --

19 MS. GIAMBRONE: G-I-E-L.

20 THE COURT: Okay.

21 MS. GIAMBRONE: And Daniel Lim, L-I-M, like Mary.

22 THE COURT: okay. And they're both attorneys?

23 MS. GIAMBRONE: Yes.

24 MR. GLASS: Are these DOE attorneys or are they  
25 other corporation counsels?

1 MS. GIAMBRONE: These are corporation counsel  
2 attorneys who (inaudible) in other (inaudible) discovery and  
3 litigation support.

4 THE COURT: All right. If they're going to continue  
5 --

6 MR. GLASS: Actually --

7 MS. GIAMBRONE: I'm sorry?

8 THE COURT: I'm going to speak now.

9 If they are going to continue to work on the case,  
10 they should file notices of appearances. I don't know if  
11 they're just there for this discussion or something else. And  
12 let me --

13 MS. GIAMBRONE: Yes, Your Honor. They've been  
14 assisting with the (inaudible) discovery. They are well  
15 versed in it, so they are sitting in on the topic that I wrote  
16 to the court about.

17 THE COURT: Okay. It's --

18 MS. GIAMBRONE: But I'll certainly (inaudible), if  
19 they have more involvement, I'll have them put in notices of  
20 appearances.

21 THE COURT: I'm going to ask again, if there's  
22 somebody who's outside or -- I don't know why but there is  
23 lots of background noise like wind or something on this case.

24 And let me be clear. We have had many telephone  
25 conferences in this case. It sometimes gets very difficult.

1 I'm going to ask you not to interrupt each other and  
2 wait until somebody's finished speaking, because I don't know  
3 if there's a delay on someone's call or whatever happens here,  
4 but people end up talking across each other and I've said  
5 before, it's very hard for me to hear, it's hard for you each  
6 to hear the other, and the recording ends up being completely  
7 jumbled and we can't get a good transcript out of it.

8 So please --

9 MS. GIAMBRONE: Understood, Your Honor. I don't  
10 think the noise is from my end. I'm sitting in a quiet office  
11 at the moment.

12 MR. GLASS: I'm in my office as well on my office  
13 phone. So --

14 THE COURT: All right.

15 MR. GLASS: Mr. Portelos is on the call, as you're  
16 aware. So he's listening in.

17 THE COURT: All right. I don't know where he is.  
18 Maybe that's where the noise is coming from, but something is  
19 -- okay. All right.

20 Another thing. My -- either the law clerks or the  
21 Scanlon chamber's email address, which the law clerks check  
22 for me on a regular basis, has been getting various letters  
23 and submissions in this case from you all.

24 I don't want those things going to that address.  
25 That address is for us if there's something that we need to

1 receive from a party, such as an ex parte settlement position,  
2 or something like that. It is not the equivalent of ECF. It  
3 is not, unless you have particular permission to use it, a  
4 submission to the court.

5 So to the extent there has been anything submitted  
6 that you think needs to be part of the record, that you want  
7 me to consider to be part of the record, you need to file it  
8 on ECF.

9 Make sure the other side has it, because that email  
10 address is not the equivalent of ECF. It's only if I say I  
11 need something and I ask you to send it to that address does  
12 that address constitute submitting whatever it is to the  
13 court.

14 So some things were sent there. Some things have  
15 been filed that were sent there. It seems like other things  
16 that were sent there have not been filed. If they were not  
17 filed on ECF and they're not something I asked for, and I  
18 didn't ask for anything related to this back and forth, then  
19 it's not in the record.

20 All right. I have this -- some various letters, but  
21 let's talk about the discovery issues for which these other  
22 lawyers are here, and then I guess the other issue is the  
23 proposed motion to amend.

24 So you're supposed to be moving along with discovery  
25 and it seems like you have hit some road bumps, which are

1       seemingly described in some of these various submissions,  
2       again, which are not all filed on ECF.

3               The ones I have right now, just so we're clear, I  
4       have the October 7th document from the City. It's a letter  
5       filed at 57. The October 6th letter that was filed at 58.  
6       That's from the City. Hold on a second.

7               (Pause.)

8               THE COURT: And let me just tell you, this call has  
9       to finish at 4 o'clock, if it doesn't finish sooner.

10              All right. Document 59, which came from the  
11      plaintiff's counsel. Document 60, which seems to have been  
12      filed. It's marked as ex parte. I don't know what this is  
13      supposed to be. It's something, October 14th. There's 61,  
14      which is an attachment, or something. It's an email, I guess.  
15      It doesn't look like it was filed ex parte. All right.

16              And we had our last conference where we went over  
17      several of the various discovery issues. So let's see.

18              You were supposed to be putting in a joint letter on  
19      October 7th. I'm not sure if that's what this one is from the  
20      City. Well, that says 57. Is that what was the equivalent  
21      of that?

22              MS. GIAMBRONE: Well, yes. Plaintiff's counsel in  
23      his motion had identified discovery issues which I then  
24      responded and also updated the court, you know, on what I  
25      think is an accurate accounting of where we are on discovery.

1 THE COURT: All right. Just to be clear, is there  
2 no joint letter, because I don't see one that seems to be  
3 joint.

4 MS. GIAMBRONE: No, it's not technically joint, but  
5 I told counsel I was proceeding in that manner and he didn't  
6 ask me to add anything.

7 MR. GLASS: That's correct.

8 My letter of September 19th was a motion for relief  
9 to amend the complaint, or supplement the complaint, and it  
10 also included various discovery issues, and Ms. Giambrone  
11 represented that she would just respond to the discovery  
12 issues in that September 19th letter as our joint letter, so  
13 she did that on October 7th, I -- or 6th or 7th, and that's  
14 what that -- her response.

15 THE COURT: All right. Well, I'll point out that  
16 the 9th --

17 MR. GLASS: We have made a lot of progress on  
18 discovery, so some of these issues are kind of moot, I think.

19 THE COURT: All right. Let's talk about them. What  
20 from the plaintiff's perspective are the outstanding discovery  
21 issues at this point?

22 MR. GLASS: Well, really, we just need to finish Ms.  
23 Hill's deposition. We got a lot of emails last week from the  
24 City and we have to go through them and we had agreed to do  
25 her deposition on October 23rd. And Mr. Portelos has already

1       been deposed more than seven hours, but we've agreed to let  
2       Ms. Giambrone a few more hours with Mr. Portelos. So that's  
3       going to be scheduled on the 22nd in the afternoon.

4               There are some follow up issues that we don't have  
5       in writing right now, but I'd just ask Mr. Portelos to see if  
6       there's any other discovery, written discovery issues and he  
7       just -- he emailed me just things, for example, like we don't  
8       have the Catherine Rodi email that we had requested. There  
9       was nothing further furnished.

10              And a few of the investigations that were referred  
11       to the Office of General Counsel, we believe we don't have all  
12       the documents that concluded those investigations. But I  
13       think for the most part we have most of what we're -- we don't  
14       think there's a lot more.

15              I mean, I can do a quick follow up letter just to  
16       Ms. Giambrone indicating what we think is outstanding, but  
17       it's not a lot. So from our perspective, I mean, we are  
18       moving for closure.

19              The only issue would be if the supplemental  
20       complaint is going to be granted, that it's going to  
21       precipitate more discovery because it's a slightly different  
22       issue regarding the rest and we -- you know, that would  
23       involve some additional fact finding as to why he was arrested  
24       and the players involved in that.

25              THE COURT: All right. So are you asking for help



1 with any of the discovery issues at this point?

2 MR. GLASS: I think in all fairness it's probably  
3 best if I sort of put them in a letter to Ms. Giambrone or an  
4 email just to tell her what we believe is outstanding at this  
5 point.

6 I mean, we have raised some of these issues before.  
7 For example, if she knows the status of Catherine Rodi emails.  
8 You know, we didn't get any of those and we've discussed it at  
9 a previous conference, so I'm not sure why, if they're  
10 representing there are none relating to Mr. Portelos or  
11 whether that search is complete. Some of the Office of General  
12 Counsel referred investigations. You know, they just sort of  
13 peter out and having reviewed the files and we really don't  
14 have a conclusion to some of those that Mr. Portelos had filed  
15 against various people. And so we were trying to find out  
16 what the conclusion of those investigations were.

17 There's an issue of a video of Joanna Geary that I  
18 think Ms. Giambrone might have represented we can review in  
19 her office. We're not really sure why that would be necessary  
20 if it's under the confidentiality order. If you could just  
21 provide us a copy.

22 But again, they're fairly minor issues so I think we  
23 can try to work those out.

24 MS. GIAMBRONE: Well, Your Honor, while we have the  
25 court's assistance, I don't really have much confidence that

1 we can work it out and so I am asking for the court's  
2 assistance.

3 In terms of these investigations with (inaudible)  
4 counsel, I think this came up last time and counsel was  
5 supposed to target what exactly he was referencing.

6 And to the extent the general counsel did an  
7 investigation, that would amount to attorney work product and  
8 I reiterate, as I have throughout the last several discovery  
9 conferences, I don't believe that these materials are in any  
10 way, shape or form relevant to the claims that are in this  
11 case.

12 MR. GLASS: Well, we were trying track down the  
13 results of certain of investigations and during the  
14 depositions it became apparent with Ms. Claudio and Mr. Gordon  
15 that they weren't even aware that they were under  
16 investigation, that Mr. Portelos had filed against them and we  
17 were trying to find out what happened to those investigations  
18 and why they were not made aware of those.

19 You know, the problem with this case is that they  
20 plug everything with privilege and we have to trust the City  
21 that it's legitimately privileged because we don't know what  
22 they're disclosing and what they're not disclosing.

23 But just because they take an SCI investigation and  
24 refer it to the Office of General Counsel and then bury it,  
25 it's not really telling us anything about what happened, did

1       they actually do an investigation.

2               And so to just say everything is privileged is part  
3       of the problem we have in this case because the City could  
4       have six attorneys on the case and one person is not even a  
5       defendant and they claim it's privileged. And they don't talk  
6       about -- a lot of times they don't even talk about legal  
7       matters. They talk about personal opinion about Mr. Portelos.

8               So the problem we're struggling with in this case is  
9       we have to rely on the City's representations of what they  
10      assume to be privileged.

11              They're not providing any privilege logs or anything  
12      and you're not getting a chance to review it and some of these  
13      emails that have come about, which precipitated this phone  
14      call, reveal very probative things that we think would be  
15      useful in litigation in proving intent in this case and we  
16      were just fortunate to get them because they were provided to  
17      us, I think the City is claiming inadvertently, but -- so I  
18      don't know.

19              So the question that really needs to be addressed is  
20      is anything privileged that any attorney in the City -- you  
21      know, the City has corporation counsel, they have OGC people.  
22      They have in-house counsel. And when the principal contacts  
23      these people they claim the whole thing is privileged if one  
24      attorney touches it.

25              And sometimes there are multiple non-attorneys on

1 the email and they still seem to claim privilege. So if  
2 there's more than one non-attorney on the email, I don't think  
3 it's privileged anymore, but they seem to claim it is. So  
4 this is an issue we're having.

5 And as I said, we have received a lot of emails from  
6 the City, so I'm not saying there's a lot left, but some of  
7 these are very probative to the true intent of how they were  
8 training Mr. Portelos, why they reassigned him and I think we  
9 think they're truly relevant.

10 MS. GIAMBRONE: Well, Your Honor, my statement was  
11 what is the relevance of an investigation forwarded to the  
12 general counsel?

13 Counsel responded that the relevance was that Mr.  
14 Gordon and Ms. Claudio did know they had investigations  
15 against them.

16 Well, if they are the decision makers who are  
17 supposedly retaliated for First Amendment speech, the fact  
18 that they don't know is not -- I mean, the fact -- it's not  
19 relevant.

20 If he seems to be asserting they didn't know, then  
21 there is no relevance.

22 MR. GLASS: Well, I think we could argue that  
23 perhaps the fact that they realize they have no consequence to  
24 whatever they do could have some relevance to how this -- why  
25 the City took further --

1 THE COURT: No, no. That doesn't --

2 MR. GLASS: I think there is some relevance. I could  
3 argue to that point.

4 THE COURT: Well, hang on. Two things.

5 One, to the extent this is a privilege dispute,  
6 there's a process for doing it. If the City needs to provide  
7 -- if there's documents you're withholding on grounds of  
8 privilege, you should provide a privilege log. Plaintiff's  
9 counsel, you should review it.

10 If you think there's grounds to doubt the privilege  
11 is appropriate based on information provided and what you  
12 know, then you should make a motion. I mean, you should ask  
13 them, obviously, to produce it and then we'll resolve the  
14 privilege dispute.

15 It's impossible to make these privilege decisions  
16 without having very particular information about what  
17 documents you're talking about, who saw it, when they saw it  
18 and what the document was. And I don't have that information.

19 MR. GLASS: Neither does plaintiff.

20 MS. GIAMBRONE: Well, I don't -- if plaintiff made  
21 the complaint, I've asked for more details, because I'm  
22 unaware of what these supposed investigations are.

23 THE COURT: All right. So hang on. One is the  
24 privilege point.

25 I guess it sounds like the City, you're making a

1 relevance argument before the privilege argument? Is that  
2 what you're saying?

3 MS. GIAMBRONE: Your Honor, I don't know what these  
4 documents are and I think at the last discovery conference  
5 plaintiff was supposed to supplement his request because the  
6 letter to the court was so vague and over broad about all  
7 investigation by the general counsel.

8 And plaintiff was supposed to contact me and give me  
9 more clarity as to what it was he was asking for, which he  
10 never did. He simply wrote a letter to the court about other  
11 issues.

12 So I still don't know what these investigations are  
13 and I'm at a loss of how to respond in light of that.

14 MR. GLASS: From our position, that's not true  
15 because we have specific case numbers. We have a list of  
16 every investigation that Mr. Portelos initiated and you know  
17 which ones they are.

18 We can give you the numbers again if you need them,  
19 but we'll give you the specific case investigations. He  
20 would have given a list of every investigation and case number  
21 that he initiated and we're trying to find the outcomes of  
22 those.

23 So if you want the case numbers, you know, we can  
24 give you the case numbers again of the ones that we don't know  
25 what happened. There are several, and you're just saying they

1       were referred to the OGC.

2               So we're trying to find out, you know, so what did  
3       the OGC do with it? Did they just say -- just let it go.  
4       They didn't further pursue it. It just gets buried and that's  
5       the issue here.

6               And if you need specific case numbers, we're happy  
7       to provide that. We have that. We know which ones we're  
8       looking for and you know too, because there was 20  
9       investigations he launched and you gave us -- you did give us  
10      the results of many of them, but the ones that were referred  
11      for some unknown reason from SCI or OSI to OGC and just get  
12      lost is what we're curious about and why that was happening?

13              Why is the ones that initiated against defendant  
14      Claudio or Andrew Gordon just referred to OGC and not further  
15      investigated? And that's what we're trying to find out.

16              And that will be very relevant to our argument at  
17      trial, or later in this case.

18              MS. GIAMBRONE: Which then leads to my next point,  
19      with this theory that has been advanced in all of these  
20      discovery conferences about this policy of burying Mr.  
21      Portelos' allegation is not a viable claim. It's nowhere in  
22      the complaint. There is no *Monel* claim here.

23              Plaintiff has not advanced this theory except in  
24      these discovery conferences and it's not part of the case.

25              MR. GLASS: We respectfully disagree. It was

1 discussed at one of the earlier settlement conferences.

2 On the transcript I think we quoted some of the  
3 language that Judge Scanlon had mentioned that there might be  
4 some relevance to and that's why I think it was ordered in the  
5 first place.

6 And to say now it has no relevance after it's been  
7 ordered and now to take the position that it has no relevance,  
8 I mean, why was it ordered in the first place? It was ordered  
9 because it was potentially relevant.

10 And if you recall, Your Honor, you did order them to  
11 provide the outcomes of the investigations that he launched  
12 and now to say it's not relevant to the case just seems to be  
13 sort of a cop out, because they already waived that argument  
14 anyway because they provided 18 of the 22. We're trying to  
15 find out what happened to the other four.

16 MS. GIAMBRONE: No, what the --

17 MR. GLASS: To say now it's not relevant, why were  
18 we doing this the last three months, if it's not relevant now.

19 I mean, obviously, there was some relevance to it.  
20 It was articulated at some earlier conferences and it's our  
21 position that the fact that some of these investigations are  
22 referred to OGC against high level players is relevant to  
23 whether he was retaliated against. The DOE is a defendant and  
24 to say that what OGC was doing with these things may have some  
25 relevance to how they treated Mr. Portelos.



1 And, in fact, the emails that were -- some of the  
2 allegedly privileged emails do seem to indicate that there was  
3 a lot of coordination among legal staff and the administration  
4 in trying to bring Mr. Portelos down, and some of that is  
5 revealed in the emails that have been disclosed. And this  
6 would go along that.

7 So the problem we have, Your Honor, is we can't --  
8 we have to rely on Ms. Giambrone's representation. We don't  
9 have a privilege log. You know, all we get is what we get  
10 from the City and without any privilege log we can't even  
11 question whether these are legitimately privileged or not  
12 because we don't know.

13 We don't know who the players were. We don't know  
14 who was emailed between and unless the court can do an in-  
15 camera inspection, there's no real way for us to even respond  
16 to her.

17 THE COURT: All right. Hang on.

18 What are we looking for here? What is it? Is it  
19 four -- is it four investigations and you want to know --

20 MR. GLASS: For example, let me give me a very --

21 THE COURT: -- is it --

22 MR. GLASS: Yes.

23 For example, we have a case number that Mr. Portelos  
24 launched an investigation against I believe it was either the  
25 superintendent or Andrew Gordon, case no. 2012-4638 R-OGC --

1 MS. GIAMBRONE: Well, that's --

2 MR. GLASS: -- SCI no. 3708 --

3 MS. GIAMBRONE: It sounds -- 2012 --

4 MR. GLASS: For example, case no. 2012-4638 R-OGC  
5 SCI no. 3708. All we know about that investigation is that  
6 Mr. Portelos launched an investigation against -- I'm not sure  
7 if that concerns -- he'll tell me if that concerns perhaps  
8 Claudio. That was Gordon.

9 Okay. So what happened was he filed an  
10 investigation against Andrew Gordon to SCI.

11 SCI appears to have deferred that investigation to  
12 OGC and we're trying to find out the results of what OGC did  
13 with it.

14 Now other investigations they kept, and they kept  
15 one against Linda Hill, and it was ultimately substantiated,  
16 you know, but -- or OSI kept one. But this one we don't know  
17 what happened. It seems like it was referred to OGC and now  
18 they're claiming privilege by not giving us the final outcome  
19 of it.

20 MS. GIAMBRONE: I have the claim (inaudible).

21 MR. GLASS: All right. Well, that's what --

22 MS. GIAMBRONE: I actually -- I'm sorry. I have to  
23 respond. Counsel just goes off on tangents.

24 First of all, what the court previously ordered was  
25 the OSI and SCI investigations, which we have turned over.

1           Secondly, I have not yet claimed privilege because I  
2       don't have -- I haven't seen these investigations. I don't  
3       know what the investigations are.

4           But as a (inaudible) matter based upon the argument  
5       that plaintiff's counsel advances on this call, it doesn't  
6       seem at all relevant. But I haven't seen them so I'm not  
7       submitting a specific argument to the court.

8           THE COURT: All right. Let me ask you how --

9           MR. GLASS: Well --

10          THE COURT: Hang on. Let me ask a couple of  
11       questions.

12          First of all, what -- how many files or  
13       investigations are you still looking for the outcome from?

14          MR. GLASS: I believe it's just three cases.

15          THE COURT: Do you have the numbers of those cases?

16          MR. GLASS: Yes.

17          THE COURT: All right. So you should provide that  
18       to defendant's counsel.

19          Defendant's counsel, you should see what the history  
20       of those cases are and then decide if there's documents to  
21       turn over or whatever -- just get them and figure out what  
22       they are.

23          Now to go back to this question about the relevance  
24       argument that was being made here. I agree with defense  
25       counsel. I don't quite understand it.

1           If they say they didn't know, are you -- the people  
2           you deposed, you're connecting these investigations to them.  
3           What's the issue?

4           You're saying they should have known, they could  
5           have known. You think this will show they're lying? What is  
6           it that you're saying that is the connection between these  
7           three investigations and the testimony that you were reporting  
8           on earlier?

9           MR. GLASS: Well, first of all, we're not really  
10          sure whether the documents themselves may reveal that they  
11          were contacted about the investigations. They claim in their  
12          deposition that they didn't know about them.

13          Now if there's a report from the -- let's say SCI  
14          has an allegation against Andrew Gordon, they might have in  
15          their files, in their notes, that Andrew Gordon was contacted  
16          and perhaps Mr. Gordon just didn't remember that he was  
17          contacted about that. And then we wanted to know what the  
18          outcome was.

19          And to the extent that he launched investigations  
20          against Gordon and Claudio, who are the very decision makers  
21          that reassigned him, coordinated bringing 3028 charges up  
22          against him, I mean, these are the actors themselves who, you  
23          know, took the retaliatory actions against Mr. Portelos.

24          And so the fact that they knew that they were  
25          subject to an investigation and the City investigative offices

1 don't really treat those very seriously, I think that would be  
2 relevant to an argument of retaliation and --

3 THE COURT: See, I'm missing you on the last step.

4 How -- I understand you had the broad argument,  
5 which I have given you latitude on, to say that by compare and  
6 contrast between how some particular cases are treated versus  
7 how your client's complaints are treated, you might be able to  
8 show as to him, not a *Monell*, but as to him some kind of  
9 improper practice.

10 But what does it have to do --

11 MS. GIAMBRONE: You --

12 THE COURT: Hang on. What does it got to do with  
13 these individuals? I don't understand when you're saying that  
14 -- I don't know what it is. They didn't know and they should  
15 have known, or they did -- you say they didn't know, but they  
16 did know. Or something else. The last piece of your theory I  
17 don't follow.

18 MR. GLASS: Well, we don't know -- first of all, it  
19 might disclose an issue of credibility if we find out that the  
20 SCI or OSI is reporting that they did know.

21 But I think it also may relevant to their motive as  
22 to how they were --

23 THE COURT: How do they have a motive if they don't  
24 know about it? That's what I don't understand. Who has a  
25 motive? These witnesses or somebody else?

1           If they don't know about it, how can they be taking  
2           an action based on it?

3           MR. GLASS: We don't know if they -- I mean, they're  
4           representing they didn't know, but I think the report should  
5           show otherwise, and there's no reason why they didn't know  
6           because they were filed by Mr. Portelos and there's no reason  
7           why they shouldn't be alerted.

8           And the fact that they didn't know would also be  
9           sort of probative to the issue of why they didn't know. If he  
10          filed a complaint against a subject, what was the reason that  
11          the DOE decided that they would not even just tell the person  
12          who had a complaint against them, to even get their side of  
13          it.

14          So can I give you -- can I articulate a perfect  
15          theory in the context of this whole case on -- you're asking  
16          me to give you a perfect theory as to how it's relevant.  
17          There's a lot of potential relevance here because why did the  
18          City not alert the people that they're under investigation and  
19          the fact that they're alerted seems to give them umbrage to do  
20          whatever they want. And --

21          THE COURT: All right. All right.

22          MR. GLASS: And had they been alerted --  
23          investigated properly, I think their actions might have been  
24          different. They might have been more careful.

25          THE COURT: All right. That last piece makes zero

1 sense to me.

2 But for the -- going back to the arguments that have  
3 been made in the past that by compare and contrast you might  
4 have information about one or more actors not treating your  
5 client as he should have been treated, so there's some sort of  
6 disparate treatment type claim, which I understand defendants  
7 are saying somehow needs to have been plead clearly on the  
8 complaint and it wasn't, okay. Let's finish this --

9 MS. GIAMBRONE: But Your Honor --

10 THE COURT: Hang on. No. Let's just finish this  
11 discovery. You provided the information. Find out what  
12 happened to those three investigations. Look at the files.  
13 Compare it to what you've already turned over.

14 If you think you have an objection for turning it  
15 over, let me know.

16 MS. GIAMBRONE: Your Honor, I just want to respond  
17 briefly.

18 The actors (inaudible) defendants -- the people who  
19 have supposedly retaliated against plaintiffs are not the ones  
20 who were involved in the investigation. So --

21 THE COURT: But I thought you didn't --

22 MR. GLASS: Well, let --

23 THE COURT: Hang on. I thought you didn't know  
24 that. I thought you hadn't seen these files so you don't  
25 actually know what's involved.

1 MS. GIAMBRONE: No, I'm saying they were not the  
2 investigatory bodies.

3 THE COURT: No, I understand that.

4 MS. GIAMBRONE: So whether the investigatory body  
5 treated Portelos differently than others, I'm just reiterating  
6 is --

7 THE COURT: I understand. All right.

8 MS. GIAMBRONE: So I just want to make a point.

9 THE COURT: I understand your argument. Just get  
10 the documents. See if --

11 MS. GIAMBRONE: Okay. Very good.

12 THE COURT: But I am going to repeat what I have  
13 said before and this is really directed at plaintiff.

14 You have -- we're wrapping up discovery. There's  
15 going to be motion practice. I understand you're making this  
16 comment that you can't give me a perfect theory.

17 Now is the time for you to figure out what your  
18 theory is, because you have had broad discovery in this case  
19 to examine your client's interactions with his employer. The  
20 City has done a lot of work. They've given a lot of documents.

21 This is going to wrap up and if there is no workable  
22 theory, then there's a good chance this case will be  
23 dismissed, or you will lose on summary judgment because you  
24 have every -- almost everything that you're going to work  
25 with.



1 And so -- I mean, this has come up --

2 MR. GLASS: I certainly appreciate that.

3 THE COURT: This has come up many times that you  
4 said I don't know, I don't know, I don't know.

5 But as we come to the end, if there's nothing that  
6 makes sense that is something that's legally viable, this is  
7 going to be a problem for your client.

8 And I don't know -- I haven't looked at these  
9 thousands of pages. I'm telling you you keep saying to me --  
10 and I don't want people wasting time on a summary judgment  
11 motion that's going to be -- not make a lot of sense to the  
12 district judge who's going to have to deal with this.

13 You need to -- everyone needs to figure out -- and I  
14 understand this is a lot of work because there's an awful lot  
15 of paper in this case. But now is the time for this to  
16 happen.

17 All right. That's the issue with the files. What  
18 else is there?

19 MR. GLASS: Your Honor, if you want me to articulate  
20 something --

21 THE COURT: No, I don't --

22 MR. GLASS: -- I thought of --

23 THE COURT: I don't.

24 MR. GLASS: Okay.

25 THE COURT: I don't want to know. What you need is

1 -- because the defendants deserve to know what it is that you  
2 think that is going on here. I mean, they're going to be  
3 responding -- I mean, look. We'll deal with this.

4 There will be the -- assuming there's going to be a  
5 summary judgment motion, you'll do your three page letters so  
6 that people are not, you know, making a summary judgment  
7 motion blind.

8 But I just think that figuring out what is going on  
9 here, what either did or didn't happen, that was or wasn't  
10 correct in terms of any of your clients' various rights, now's  
11 the time to do the work that's involved, because over and over  
12 again there's an incomplete theory; something that doesn't  
13 quite work and you have had an awful lot of leeway.

14 So what else? The attorney --

15 MS. GIAMBRONE: There --

16 THE COURT: Hang on. Hang on.

17 From the plaintiff, what else is there or what else,  
18 the defendant, do you think is not going to be something you  
19 can work out?

20 MS. GIAMBRONE: Well, Your Honor, there's the video  
21 which counsel mentioned he didn't know why we couldn't just  
22 turn it over.

23 As I mentioned in my letter it has the images of  
24 minors, which we are not at liberty to turn over pursuant to  
25 FERPA.

1           So I said that we can make a time and meet at my  
2           office and watch the video and if there is a specific portion  
3           that he would like a copy of, I then will have to go through  
4           the process of trying to get those -- the faces blurred out,  
5           or something to that effect.

6           MR. GLASS: Well, that's subject to the  
7           confidentiality order, so our position -- I mean, we would see  
8           what's the problem because we're not going to disclose it to  
9           anyone. We're just going to look at it and we're not going to  
10          use it because we're subject to the confidentiality order. So  
11          I don't really see what the extra protection they're clothing  
12          this with, but I don't have a problem with reviewing it there  
13          and then I guess we can try to work it out from there if we  
14          really have a need for the video.

15          But honestly, I don't see any real protection that  
16          they have to be concerned about.

17          MS. GIAMBRONE: Well, the paper documents, the  
18          names of minors were redacted --

19          THE COURT: Right.

20          MS. GIAMBRONE: -- because we -- the DOE would be  
21          in violation of federal law if we turned it over. And that's  
22          the basis of my saying that (inaudible) first at my office.

23          THE COURT: All right. Look, there's no -- you  
24          don't even know if this thing has anything to do with  
25          anything. So go look at it. See if it's something you need.

1 See if you can work out some way to have a copy of it.

2 The confidentiality order only covers discovery. It  
3 doesn't deal with what is going to happen at trial, and at  
4 least the last time we talked about this was a video that was  
5 somehow going to prove a negative. You know, that's the last  
6 thing we talked about. So go find out if it actually does  
7 that and then go from there.

8 All right. What else?

9 MR. GLASS: Just one other issue we have with the  
10 Catherine Rodi emails. We had brought it up previously. I'm  
11 not sure what the City's position is; if they've exhausted  
12 their search or whether -- because at first there was a  
13 representation that we had the Andrew Gordon emails and then a  
14 lot more were uncovered.

15 So we'd like to know whether there's any other  
16 Catherine Rodi emails concerning Mr. Portelos, if that search  
17 is completed or are they still searching.

18 MS. GIAMBRONE: I did rerun the search and I think  
19 I came up with one or two more documents. I thought I had  
20 turned it over, but if I didn't do that, I'll do it within the  
21 next 24 hours.

22 THE COURT: Okay.

23 MR. GLASS: Okay.

24 THE COURT: What else?

25 MS. GIAMBRONE: And we'll look into it further just

1 to triple check, but certainly he'll have a response on that  
2 before the close of discovery.

3 MR. GLASS: Yes, we don't have any Catherine Rodi  
4 emails at all, so I just want to represent that.

5 THE COURT: All right. What else?  
6 Anything else from the plaintiff?

7 MR. GLASS: The only question is how are the -- do  
8 you want to deal with that later, the proposed supplemental  
9 complaint or --

10 THE COURT: I want to finish talking about discovery  
11 first. And I'm telling you I have a 4 o'clock, so let's keep  
12 going here. What else?

13 MR. GLASS: There was some reference at a deposition  
14 to a signature page. We'll follow up in writing with that and  
15 see if that's an issue, but again, we'll follow up on -- it  
16 was called a CAP signature page. There was a representation  
17 that the original was in Principal Hill's office and I guess  
18 I'll be asking her about that and see what she says.

19 (Inaudible) Claudio represented that it was in  
20 Principal Hill's office and we'd like them to provide that to  
21 us.

22 THE COURT: All right. How do you spell Rodi, just  
23 for the record?

24 MS. GIAMBRONE: R-O-D-I, or Rodi I think she might  
25 actual --

1 THE COURT: All right. Anything else from the  
2 plaintiff?

3 MR. GLASS: No, not concerning the present  
4 complaint.

5 THE COURT: All right. From the defendant?

6 MS. GIAMBRONE: Yes, Your Honor. We had apprised  
7 the court last -- on the 30th of September, we exchanged a  
8 number of emails, I think something like 700 pages associated  
9 with emails related to Andrew Gordon.

10 And evidently there were a handful of documents that  
11 were attached as native attachments which inadvertently were  
12 produced without appropriate redactions.

13 And the very next day we had a deposition and  
14 (inaudible) --

15 THE COURT: Hang on. You're --

16 MS. GIAMBRONE: -- where these

17 THE COURT: You're fading out. Come closer.

18 MS. GIAMBRONE: I think it's something to do with  
19 plaintiff's phone.

20 MR. GLASS: I think he's on mute, so I don't know  
21 why -- you shouldn't be hearing anything on his end.

22 MS. GIAMBRONE: Or counsel. Your phone has a lot  
23 of breathing on it and it's just taking away from --

24 MR. GLASS: I apologize. It's my office phone. I  
25 can't do too much about Regus, if it's a bad connection.

1 MS. GIAMBRONE: Do you want to put me on speaker on  
2 your line perhaps, or -- am I on speaker?

3 MR. GLASS: Let me try to put it on speaker and see  
4 if that helps.

5 THE COURT: All right.

6 MR. GLASS: Can you hear me?

7 THE COURT: Yes, we can hear you. Go ahead.

8 MS. GIAMBRONE: Yes, Your Honor.

9 So there were about a handful of documents. The  
10 very next day Andrew Gordon was deposed and plaintiff marked  
11 these emails as exhibits.

12 And once I realized that these had been  
13 inadvertently produced, I immediately on the record requested  
14 that they be returned. I said pursuant to federal law that I  
15 was not waiving my privilege and I asked that they be  
16 returned. Counsel did not agree and said that he would look  
17 into it.

18 I followed up with a letter the next day asking for  
19 him to let me know by the day after that, which he never did.

20 That following Monday we had a deposition. He said  
21 he was continuing to research the issue, which is when I then  
22 wrote to the court, and I apologized doing it via email, just  
23 based upon the fact that plaintiff had used the email. I  
24 decided to follow suit.

25 But regardless, Your Honor, where it stands now,

1       there are a handful of documents that were produced within the  
2       700 pages.

3               We submit that we have taken reasonable measures to  
4       protect the attorney/client privilege. These documents are --  
5       contain communications and attorney work product between DOE  
6       attorneys and Principal Hill and others whereby legal theories  
7       are discussed amongst them regarding Mr. Portelos.

8               We believe that they absolutely should be returned  
9       or at the very least should be recovered by plaintiff's  
10      counsel and not maintained within plaintiff's hands and which  
11      I also then wrote an email to the court, which I did not  
12      refile on ECF because we do have the conference now.

13              But Mr. Portelos did file a Tweet where he said --  
14      and he actually posted it on the New York City School's  
15      Twitter account where he said we are breaking at New York City  
16      School's attorney/client privilege including accidentally  
17      leaked info showing corruption.

18              Your Honor, we believe this is wholly inappropriate.  
19      We are again requesting that these documents be returned  
20      immediately and we submit that no attorney/client privilege  
21      has been broken.

22              And I will gladly turn them over to the court for  
23      further review because I don't believe there's any question  
24      that these documents should be afforded privilege.

25              And obviously, just for plaintiff's benefit, this is



1 spelled out in Federal Rule 26(b)(5) and Federal Rule 502(b).

2 THE COURT: All right. What's plaintiff's position?

3 MR. GLASS: Yes. It was an issue I was not familiar  
4 with.

5 I did a little research on it and -- when it became  
6 an issue after she was -- obviously, she provided these emails  
7 and we did mark them. She's correct. We did ask questions of  
8 Mr. Gordon and Ms. Claudio about some of these and I think  
9 it's already been out there.

10 I wouldn't have a problem with the court reviewing  
11 these emails as well. I think they really are just emails  
12 between a number of DOE attorneys and HR people, or Linda Hill  
13 or Claudio, and they're talking about what they're going to do  
14 with Mr. Portelos.

15 And it's very relevant to -- for example, why was he  
16 reassigned in April? A big part of our complaint is what was  
17 the policy that caused him to be reassigned. And these are  
18 probative to the motives as to when -- at what point did they  
19 reassign him. Why did they need to reassign him? What kind  
20 of case they would have to build to reassign him?

21 THE COURT: All right. So --

22 MR. GLASS: It's extremely probative to our theory  
23 and these are the kinds of things that they're clothing with  
24 privilege. We would not have known about them had not defense  
25 counsel disclosed them. Then we'd be in the dark about it.

1           They're extremely probative and I'm not even sure  
2           they're covered by the privilege, honestly, and that's  
3           something I'd want to research, too because --

4           THE COURT: All right. So this is what we're going  
5           to do. This is what we're doing.

6           You need to return all of those emails. You need to  
7           segregate the testimony that has anything to do with those  
8           emails.

9           The way to deal with a privilege question is not  
10          because somebody inadvertently reveals something amidst the  
11          production in this case overall of thousands of pages.

12          Somebody's mistake is not a waiver of privilege. As  
13          has been reported, and you have not disagreed, or the  
14          plaintiff's counsel, that they promptly identified the error  
15          and asked for them back.

16          The appropriate way to do it is to return those  
17          documents. Plaintiff can't have a copy. Plaintiff's counsel,  
18          you cannot have a copy. You have to give them back and to the  
19          extent you asked questions and marked those as exhibits at the  
20          deposition, they need to be, as I said, isolated, segregated  
21          and you can't use that testimony.

22          If you're going to have this privilege dispute,  
23          which so far it doesn't seem to have been resolved, to the  
24          extent the plaintiff -- sorry -- the defendants are  
25          withholding documents based on privilege, they need to produce

1 a privilege log.

2 These documents can be on that privilege log. And  
3 the plaintiff's counsel, you should review to see if there is  
4 any issue as to the nature of the communications.

5 Just because it talked about something that you  
6 think is probative, doesn't mean you can have access to it.

7 Now I don't know enough about these documents to  
8 know was there somebody who was participating in the  
9 conference that somehow destroys the privilege. I don't know.

10 But you're not going to get an advantage in this  
11 case as to getting information because somebody made a mistake  
12 and made a good faith effort to correct that mistake promptly.

13 So give them back. You need to do that by Monday  
14 morning, because that --

15 MS. GIAMBRONE: Thank you, Your Honor.

16 THE COURT: -- is not happening here.

17 Now --

18 MR. GLASS: Your Honor, I mean, I don't know --

19 THE COURT: No. There is no -- this is not going to  
20 be gamesmanship here. And people -- everybody has been  
21 working hard on this case. Everyone has -- it seems to me  
22 from everything I've heard there was a lot of effort put into  
23 review.

24 And just because something slipped inadvertently by  
25 doesn't mean that now you can operate from the position of

1 having access to confidential information.

2 If it turns out when you exchange the privilege log  
3 and you try to resolve the issue and you can't resolved the  
4 issue, that's not privileged and maybe on some of these  
5 documents we'll have an in camera review. Then you can have  
6 those documents.

7 But not because somebody made a mistake. There's  
8 things --

9 MR. GLASS: Your Honor, with all due respect, these  
10 are the types of documents that I'd want you to review for in-  
11 camera and I'm not going -- unless and until I get that  
12 privilege log, which I have to say is going to be a huge task  
13 for the City, because there's going to be thousands of emails  
14 that should be on this privilege log -- because I'm telling  
15 you, there are probably 5,000 emails that the City is going to  
16 claim are privileged that we have no access to.

17 So if we're going to do go down that route, it's  
18 going to be very problematic for the City, because the City's  
19 going to have to come back with a huge privilege log that  
20 we're going to need to go through and then ask you to look at  
21 these things.

22 And I actually think it would be a lot easier if you  
23 look at these -- there's only about ten emails at issue.

24 THE COURT: No. I told you, no.

25 MR. GLASS: If they have to be logged or not --

1 THE COURT: No. Mr. Glass --

2 MR. GLASS: I mean, I think that would be a lot  
3 easier for the City, actually.

4 THE COURT: Mr. Glass, I already made the decision.  
5 You're not re-arguing it. If that's what the City wants to do  
6 and propose something else, I'm giving them the option of  
7 having the privilege log.

8 And if somehow --

9 MS. GIAMBRONE: Well, Your Honor,

10 THE COURT: -- and somehow you're doing it by  
11 groupings, you know, you can figure out the right way to do  
12 it.

13 MS. GIAMBRONE: Well, Your Honor, I just want know  
14 -- because I think the issue of privilege log came up  
15 previously.

16 THE COURT: Right.

17 MS. GIAMBRONE: I've always redacted the documents  
18 clearly so it was never a question of not turning over  
19 documents. In the OSI and SCI records, the only things that I  
20 redacted were the bank records and the student information and  
21 things of that nature.

22 With regards to emails, there have been thousands  
23 upon thousands of documents that were previously turned over,  
24 which has never been raised by plaintiff.

25 I'm happy to do a privilege log with regard to the

1 Andrew Gordon emails. I just want to be sure if we are going  
2 back to everything, then I'm going to need a lot of time to do  
3 that.

4 THE COURT: Look, I don't need a -- there doesn't  
5 need to be a privilege log that is every single document, if  
6 there are groups and there's no dispute.

7 You've taken out -- and we already went through this  
8 back when we were talking about the different kinds of files,  
9 and different kinds of information. I let financial  
10 information be taken out. I let children's names be taken  
11 out. I let -- you know, we've already covered all that.

12 This is not to go back and redo all this and have  
13 somebody waste their time on administrative work that makes no  
14 difference to the case.

15 And if there are categories of documents in which  
16 the same information was redacted over and over and over  
17 again, just have a grouping.

18 And if you don't disagree as to what happened, then  
19 I don't need to know anything about this. And there doesn't  
20 need to be a privilege log.

21 If you have some kind of dispute about some issue,  
22 for example, these Gordon documents, then handle it with a  
23 privilege log.

24 But it's not going to be some half baked approach  
25 and it's not going to be, to repeat myself, because there was

1       some kind of mistake that there's some kind of advantage in  
2       this case.

3               So I don't have a sense of the scope of what it is -  
4       - you know, I don't know why it's being said that there are  
5       thousands of documents for which you need a privilege log.

6               You know, if it's --

7               MS. GIAMBRONE:   No, I just want to be sure that I'm  
8       not in violation of any court order.

9               THE COURT:   No.

10              MS. GIAMBRONE:   I'm happy to do a privilege log  
11       with regards to the Andrew Gordon documents that were turned  
12       over on the 30th. I mean, there were about 700 pages, but I  
13       think I can do that in a relatively expeditious way.

14              So if that's amenable to the court and I think that  
15       will satisfy Mr. Glass, because it covers the documents in  
16       question --

17              THE COURT:   Look. You should have a conversation  
18       between yourselves, because it doesn't seem like you've talked  
19       about what it is and now plaintiff is complaining about, you  
20       know, this allegation was made early in today's conference  
21       about some effort by the defendants to cloak everything in  
22       some -- in privilege. I don't know what you're talking about.

23              So it's --

24              MS. GIAMBRONE:   Well, neither do I.

25              THE COURT:   To the extent this is an issue, you

1       should have a discussion, you have -- in relation to  
2       particular documents, or particular categories of documents,  
3       and figure out the most expeditious way to raise any dispute  
4       you have about privilege.

5               So you all need to talk. And to the extent -- I  
6       mean, you're supposed to be finished discovery next Friday,  
7       right?

8               MS. GIAMBRONE:    Yes.

9               THE COURT:    So you need to talk about this and let  
10      me know by next Friday what, if any, privilege issue there is.

11              MS. GIAMBRONE:   Well, Your Honor, just -- what I  
12      had previously proposed to counsel was to specify what  
13      documents he had questions about and I actually attached it to  
14      my discovery letter and he did and I responded specifically.  
15      I said that redaction is information of a minor. That  
16      particular redaction is related to a banking record.

17              So I've tried, when he gives me enough information,  
18      to respond in kind so when he gets on these discovery  
19      conferences and makes these grand statements about cloaking  
20      everything in privilege, I'm quite surprised.

21              THE COURT:    All right. Well, you need to try to  
22      narrow the issues. So I want a letter by next Friday as to  
23      what outstanding --

24              MR. GLASS:    (Inaudible).

25              THE COURT:    You're breaking up now. Say it again.



1 MR. GLASS: I mean, I think we're going to be at the  
2 same place which I suggested in which it might just expedite  
3 matters to review the emails at issue and decide if these  
4 should be returned or not.

5 I mean, I think it would --

6 THE COURT: I do not want to hear that you have  
7 those documents after Monday morning. You know, even if what  
8 ends up happening is you send it to them and they end up  
9 sending them back to you after we make this discovery  
10 decision, you know --

11 MR. GLASS: I mean, the question becomes -- they've  
12 been questioned, there's been testimony -- extensive testimony  
13 about some of the emails --

14 THE COURT: I don't even know why that happened.  
15 They told you they wanted the documents back as soon as they  
16 realized it.

17 MR. GLASS: No, they only did that after we asked  
18 the question.

19 And I think if you look at the cases I cited --

20 MS. GIAMBRONE: Yes.

21 MR. GLASS: -- the article I cited, it says that --  
22 you know, Your Honor, with all due respect, I think there's  
23 law that the privilege is waived and it's very hard to recall  
24 the privilege and their representation that they really took  
25 prompt action is not really the law that -- is not the way the

1 law works, because the cases I saw that I researched and I put  
2 that in the letter today, seems to suggest that she would not  
3 win on this -- the recall of these documents, because it's not  
4 to say that once the documents are used to say we made a  
5 mistake, let's take them back. That's not really what  
6 happened.

7 I mean, what happened is the deponent was  
8 embarrassed by information being asked and became very  
9 uncomfortable and then she realized that her deponent was very  
10 uncomfortable and said I've got to call these back.

11 MS. GIAMBRONE: The record will speak for itself as  
12 to what transpired. They were marked and I immediately said  
13 these should be returned, and the appropriate way is to return  
14 them and then for us to (inaudible) them.

15 If what counsel wants is to return them to me, and  
16 then I will specifically identify the privilege in each of  
17 those documents, then perhaps that's another way to handle it.

18 But, you know, Your Honor, I do agree that we should  
19 absolutely -- he should not maintain ownership of those  
20 documents.

21 THE COURT: Look. I don't know what -- I mean, based  
22 on all the information that's been provided this is, as  
23 defendant's counsel referred to, a matter that's addressed in  
24 Rule 26.

25 And when there has been a situation -- it says,

1 "after being notified a party must promptly return, sequester  
2 or destroy the specified information, any copies of it, must  
3 not use or disclose the information until the claim is  
4 resolved, must take reasonable steps to retrieve the  
5 information that the parties disclosed it before being  
6 notified and may promptly present the information to the court  
7 under seal for a determination of the claim.

8 You need to do the first part of that, which is I do  
9 not want the information to be out there.

10 And the safest way to do that is I'm ordering you,  
11 to plaintiff's counsel, to return the documents to the City's  
12 counsel. The plaintiff cannot keep a copy of it. Plaintiff's  
13 counsel cannot keep a copy of it for now.

14 In order to make this a very orderly thing, you can  
15 -- I'm giving the defendant's counsel the option of providing  
16 a privilege log as to those documents. This is aside and  
17 apart from whatever dispute you have about privilege and all  
18 these other documents that are redacted, which you seem to  
19 have taken some steps to resolve.

20 But you have to return those documents. This is not  
21 an option. And then you can litigate the issue in a more  
22 orderly fashion.

23 And I want that deposition testimony, if you have  
24 it, it needs to be separated from the rest of the deposition  
25 and you cannot use it, because you should -- at least on

1        what's been presented, right now you should not have had that  
2        information. You shouldn't have used it once they told you it  
3        was accidentally, whatever word was used, turned over. They  
4        claim the privilege.

5                So that is the ruling and I'm not changing it.  
6        You're going to get a process by which you can litigate  
7        whether or not that's information you're entitled to have.  
8        But it's going to be based on the substance and not on this  
9        mistake that seems to have been made and that was promptly  
10       identified.

11               And I mean, I'm saying mistake. There are plenty of  
12       times when people decide to do a global production and then  
13       you have the claw back option in order to expedite the  
14       process. So I don't know what happened. Maybe it's even an  
15       over statement to call it a mistake.

16               But it was brought to your attention and so  
17       privilege is something that it's fair to take seriously. I'm  
18       taking it seriously and I do not want this information used  
19       until you resolve this issue properly. So then --

20               MR. GLASS: Well --

21               THE COURT: -- to be clear. I know Mr. Portelos is  
22       on the line. Whether he hears what I'm saying or you tell  
23       him. This information cannot be circulated based on its  
24       having been obtained through the production of these  
25       attachments to these emails.

1           If after we cover these bases it turns out yes,  
2           there's not a privilege, fine. You have it and it's whether  
3           it comes under the confidentiality agreement or not. Or  
4           confidentiality agreement/order.

5           MR. GLASS: Yes, we understand, Your Honor. I just  
6           want to make clear from Ms. Giambrone's representation about  
7           the Twitter. Nothing was disclosed regarding the content of  
8           those emails to anyone.

9           He did say -- he posted an article to whether a  
10          waiver of privilege applies. It was a generic article which I  
11          asked him to take down immediately, which he did, but nothing  
12          about these emails have been disclosed to anyone in this  
13          litigation, you know, other than -- and he's not disclosing it  
14          outside this litigation.

15          So there's nothing to violate any order. In fact, I  
16          mean, he didn't post anything about this other than the fact  
17          that we think we got some information that's very helpful to  
18          our case.

19          But we didn't get any specifics of information. It  
20          was just a generic article about the waiver of privilege  
21          doctrine.

22          And also just from a practical standpoint, I  
23          understand your ruling. I believe these were provided on a CD  
24          and I mean, I'll -- there's really nothing physically to  
25          return. I mean, if you're saying we can't use them, I

1 understand your ruling. We're not going to use them. We're  
2 not going to use them in any fashion.

3 But I mean, I don't think there's anything  
4 physically for us to do other than to agree that we won't use  
5 these emails that she's designated. I think you made your  
6 final ruling.

7 Would that be sufficient, because I don't -- I can't  
8 give her a disc back. I mean, there's really nothing to give  
9 her at this point. They've been asked. We haven't --

10 MS. GIAMBRONE: Well, they were printed --

11 MR. GLASS: We'll just agree not to use it. I mean,  
12 that's -- not to disclose it to anyone.

13 THE COURT: Hang on. I'm just going to interrupt you  
14 one second.

15 (Court addresses another matter.)

16 THE COURT: Okay. I'm sorry. Go ahead.

17 MR. GLASS: I'm just saying from a --

18 THE COURT: All right. So for the City --

19 MR. GLASS: I don't think there's anything  
20 physically for me to return because I think it was a CD and  
21 we're not going to use it in any fashion. I mean, I understand  
22 your ruling. Until you make any further rulings about this,  
23 we'll just --

24 MS. GIAMBRONE: Well, the documents were printed  
25 out and marked as exhibits. So plaintiff certainly has those.

1           At one point they were actually turned over via  
2       Dropbox and I believe that Mr. Portelos may have downloaded  
3       them and the rule does require that they promptly return,  
4       sequester or destroy.

5           So I would like an assurance that to the extent  
6       there's an electronic copy saved on someone's computer, that  
7       they are promptly destroyed.

8           THE COURT: So do you know, Mr. Glass, what the  
9       story is in terms of the production on your end? Was it  
10      downloaded? Was it on a disk?

11          MR. GLASS: I think they gave us 700 pages on a  
12      Dropbox link. They told me to download the link. And so some  
13      of these emails are on that link.

14          THE COURT: All right. But can you --

15          MR. GLASS: I figure ten pages she wants to recall  
16      so if she wants those pages recalled, just identify those  
17      pages and --

18          MS. GIAMBRONE: And, Your Honor, in my letter I  
19      then dropped off another CD reproducing the production and  
20      simply having those documents properly redacted.

21          So we can literally delete the first production  
22      because I've reproduced it in an appropriate manner.

23          THE COURT: All right. So why don't you do that.

24          So Mr. Glass -- and if your client has a copy, he  
25      needs to do the same. Just destroy the old copy, delete it

1 off your computer. Destroy those copies, or send them -- if  
2 you have them marked as exhibits, mail them, or deliver them,  
3 however you want to do it, to the City. They can keep custody  
4 of those documents and if and when you get that transcript,  
5 isolate the copies of those -- the pages of the transcript  
6 that are the discussion and send them to the City.

7 MR. GLASS: But I would like to argue the point. I  
8 mean, the emails themselves --

9 THE COURT: I'm not -- no, no, no.

10 MR. GLASS: The privilege --

11 THE COURT: No. No, no. Mr. Glass, no. We're  
12 talking about the issues that have been raised and I have a  
13 process by which you're going to resolve the issue. And this  
14 conference is already going well over. It's just that the  
15 person happens to be late for the next case.

16 MR. GLASS: No, I understand your waiver of  
17 privilege argument. My only question was if we were going to  
18 assert, as you suggested, the privilege log and we disagree  
19 with their privilege log, how do we come back to you on that  
20 issue?

21 THE COURT: You write me a letter, a joint letter,  
22 by next Friday as to whatever issues are outstanding with  
23 regard to privilege.

24 All right. I have the two letters that are the  
25 proposed issues with regard to the -- I don't know --



1 amendment, supplemental complaint. Do you want to put  
2 anything else in writing?

3 MR. GLASS: You're asking plaintiff's counsel or  
4 defense?

5 THE COURT: Both.

6 MS. GIAMBRONE: I don't believe so. I think  
7 everything else should be within this transcript, Your Honor.  
8 Oh, there is the issue, of course, of the motion.

9 I guess Your Honor will just decide based upon the  
10 letter --

11 THE COURT: Well, that's what I'm asking. Do you  
12 want to put anything else in?

13 MS. GIAMBRONE: No, no.

14 THE COURT: Okay. For the plaintiff? I have the  
15 draft complaint and your letter. I assume that's the draft  
16 complaint, the one that's attached.

17 MR. GLASS: Yes.

18 THE COURT: Do you want to put anything else in?

19 MR. GLASS: I don't believe so.

20 THE COURT: Okay. So -- all right. Let me get your  
21 letter next week and let's talk -- how is the 28th at 12  
22 o'clock?

23 MS. GIAMBRONE: I have an oral argument that  
24 morning. If there is an afternoon time that works for Your  
25 Honor, that might be better.

1 THE COURT: Okay. How about -- right now -- hang on  
2 a second. All right. How about the Monday before, the 27th  
3 at 2:30.

4 MS. GIAMBRONE: That's fine.

5 MR. GLASS: Is it okay to make it at 3 o'clock so  
6 Mr. Portelos can listen in. Is it going to be in person or  
7 over the phone?

8 THE COURT: On the phone. That's fine. Is that all  
9 right?

10 MS. GIAMBRONE: Yes. Yes.

11 THE COURT: All right. So let's do a telephone  
12 conference --

13 MR. GLASS: Let me just say one other issue. I know  
14 you don't want to extend the case forever and, again, I don't  
15 want to keep amending the complaint, or supplementing the  
16 complaint, but I think you should be aware that Mr. Portelos  
17 in September, the last couple of weeks, was written as  
18 unsatisfactory on two evaluations in (inaudible) outside his  
19 license area.

20 And the issue of -- the question would be would that  
21 part of the ongoing retaliation, which we -- it's rather  
22 obvious, but I don't know. I don't want to keep serving you  
23 with supplemental complaints and I understand you have to  
24 bring closure to the case as well, but I think I just need to  
25 identify that and --

1 THE COURT: All right. Well, you all should talk  
2 about it. I don't really know where that's going to go. Is  
3 this something -- this is a 2012 case. I don't know. I don't  
4 know.

5 I mean, on the one hand, maybe you have some sort of  
6 retaliation theory. On the other hand, not everything that  
7 happens in his employment can be cast as part of this case.

8 So I think you need to explore it and you need to  
9 have discussion with defendant's counsel about how, if at all,  
10 it's relevant to this case. I don't know who the players are  
11 in this current employment, who's the supervisor, who wrote  
12 him up. What happened.

13 If there's a method for him to complain about that,  
14 I mean, I assume there's some kind of -- well, I don't know if  
15 it's right to assume, but some sort of grievance process.

16 MR. GLASS: (Inaudible) you know, the UFT bargained  
17 away the right to really challenge your ratings, so it's a  
18 difficult process.

19 THE COURT: Well, I don't know. You all should talk  
20 about it before you put it forward here.

21 MS. GIAMBRONE: I think we have pre-motion letters  
22 due on the 30th. Is that -- if we wanted an extension on  
23 that, would that be directed to Your Honor or to --

24 THE COURT: Yes.

25 MS. GIAMBRONE: -- Judge Mauskopf.

1 THE COURT: Let's -- I'm just looking at the  
2 schedule. Which date are they on?

3 MS. GIAMBRONE: I don't have the docket up, but  
4 it's on the 30th.

5 THE COURT: All right. We'll push that out till say  
6 the 21st of November.

7 MS. GIAMBRONE: And the joint pretrial order is due  
8 that day.

9 THE COURT: All right. Let's push them both out, but  
10 effectively we'll talk about it on the 27th.

11 MS. GIAMBRONE: Okay.

12 THE COURT: So 11/21. Okay. Okay. All right. So  
13 see if you can work out some of these or all, ideally, of  
14 these privilege issues and let me know next week where you  
15 stand.

16 MR. GLASS: I'm sorry. Can I just -- one more about  
17 the returning of the documents. Is it okay if we drop them  
18 from Dropbox? Would that be sufficient, or do you need  
19 something physically back from me?

20 THE COURT: If you have paper copies, either destroy  
21 them or send them back.

22 But since you mentioned -- it seems to me that there  
23 were deposition exhibits, rather than destroy them, send them  
24 back to the City. If there are electronic copies, delete them  
25 and -- or delete the whole file, because the City's

1 representative provided you with a replacement.

2 And then just confirm to the City that that's what  
3 you've done. And it's clear to you and your client.

4 MR. GLASS: All right.

5 THE COURT: All right. Anything else?

6 MS. GIAMBRONE: Not from defendants, Your Honor.

7 THE COURT: All right. So we'll talk on the 27th  
8 and see where you're all at, okay?

9 MS. GIAMBRONE: Thank you.

10 THE COURT: All right. Thank you. Take care.

11 MS. GIAMBRONE: Bye. Have a good afternoon.

12 (Proceedings concluded at 4:19 p.m.)

13 (Proceedings concluded 4:13 p.m.)

14 I, CHRISTINE FIORE, court-approved transcriber and  
15 certified electronic reporter and transcriber, certify that  
16 the foregoing is a correct transcript from the official  
17 electronic sound recording of the proceedings in the above-  
18 entitled matter.

19  
20 

21 \_\_\_\_\_ November 17, 2014

22 Christine Fiore, CERT  
23  
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